



Final Regulation Agency Background Document

Agency name	Virginia Pesticide Control Board
Virginia Administrative Code (VAC) citation	2VAC20-51
Regulation title	Regulations Governing Pesticide Applicator Certification Under Authority of Virginia Pesticide Control Act
Action title	Amending 2VAC20-51 to add new requirements for pesticide application and registered technicians
Date this document prepared	April 16, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

Substantive changes being proposed in this regulatory action include: adding new definitions to clarify who must be certified and keep pesticide application records; adding new definitions to clarify the required supervision standard for people training to become applicators; adding categories and/or subcategories of pesticide applicators; establishing minimum standards for on-the-job training for Registered Technicians when working in different categories or subcategories; establishing a time frame within which a person would have to finish training and take the registered technician examination; eliminating the provision allowing businesses or agencies to proctor the registered technician examination to their own employees; and requiring applicators not for hire to keep records of all pesticides applied, rather than just records of restricted use pesticides.

A substantive change made to the regulation from the time of publication of the proposed regulation to the final regulation is the establishment of a time frame for retaking the registered technician exam after the applicant has failed it, and a provision to prohibit an applicant who has failed the exam more than once from applying pesticides on the job until the applicant has passed the exam.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The Virginia Pesticide Control Board adopted the suggested changes as final amendments to the Regulations Governing Pesticide Applicator Certification Under Authority of Virginia Pesticide Control Act on January 17, 2008.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The basis for this regulation is §§ 3.1-249.30, 3.1-249.51, 3.1-249.52, 3.1-249.53, 3.1-249.54, 3.1-249.55, and 3.1-249.56 of the Code of Virginia.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The regulation is necessary to protect health, safety and welfare of citizens because it ensures that those individuals applying pesticides are properly trained so that they may apply pesticides in a manner that will not harm themselves, other people or the environment. Also, by requiring the training and certification of pesticide applicators, citizens are able to save considerable money in that necessary pesticide applications are made using only the amounts required to control targeted pests.

By requiring applicators not for hire to record the uses of all pesticides applied, it will be easier to determine, during investigations of complaints of misuse of pesticides, whether the pesticides were applied according to the label and law. Currently, records are required only for the use of restricted use pesticides.

Removing the provision that currently allows for businesses to give (proctor) examinations to their employees seeking certification as Registered Technicians will eliminate an opportunity for fraud by some proctors thereby helping to ensure that only qualified applicators are applying pesticides on citizen's property. Also, requiring Registered Technicians to receive on the job training in each of the categories or subcategories in which they plan to work will help ensure the safety and welfare of Virginia's citizens. Currently, once a person has received 20 hours of on the job training in one category or subcategory, they are not mandated to receive any training at all in another category prior to applying pesticides. A lack of knowledge of associated pest control strategies and environmental hazards carries the potential for human health and environmental hazards.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” section.

Substantive changes to existing sections include:

1. Add language making some definitions easier to read and clarifying the meaning of a not-for-hire applicator and the requirements of such applicators to keep records of pesticide applications.
2. Add a definition of a “competent person” on the advice of the Attorney General’s office
3. Delete definitions that are not used in the regulations.
4. Add language to clarify the type of supervision required for people training to become certified applicators and registered technicians.
5. Add language to bring the regulation into compliance with the Virginia Pesticide Control Act as it relates to daycare center not-for-hire applicators.
6. Add language stating the exact application process for pesticide applicators, including the payment of appropriate fees.
7. Add language to clarify the training necessary for Registered Technicians when applying pesticides in more than one category activity.
8. Add language to ensure that applicators cannot apply pesticides unless they have been certified in a particular category.
9. Amending language to better state the conditions under which an illiterate person might be granted a certificate.
10. Add language to require registered technician applicants to complete the process of training and testing within an accepted time frame as well as making the process easier to understand.
11. Delete language that currently allows businesses and agencies to proctor their own Registered Technician examinations.
12. Add language to clarify the conditions required for certification of applicators applying paint containing pesticides.
13. Add language to allow the Board to designate additional categories of commercial applicators to meet federal mandates.
14. Add language clarifying what adverse effects need to be reported.
15. Add language to make the process for suspending a certificate for non-payment of a civil penalty more easily understood.
16. Add language to clarify what data needs to be reported in the case of pesticide accidents and incidents.

Issues

Please identify the issues associated with the proposed regulatory action, including:
 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
 3) *other pertinent matters of interest to the regulated community, government officials, and the public.*
If there are no disadvantages to the public or the Commonwealth, please indicate.

The advantages of the amendments include: (1) the regulation will be easier to read and understand for the industry and the regulators; (2) requirements for supervision and training of applicators and registered

technicians will be easier to understand by the public and industry and will help ensure that only knowledgeable people will be applying pesticides; (3) record keeping requirements will be implemented to assist the public and the agency in determining whether or not pesticides have been applied according to label directions.

There are no disadvantages to the public or the Commonwealth of Virginia.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
2 VAC 20-51-50	Applicants for the Registered Technician examination must take the exam within 90 days of beginning a position that requires the commercial use of pesticides.	Additional language requires that if an applicant fails the exam he must reapply and retake the exam within 30 days. If the exam is failed again, or not taken within 30 days, the individual may not apply pesticides commercially until the exam is passed.	The earlier language did not specify consequences for not passing or not retaking the exam. This requirement is designed to ensure that only competent individuals make commercial pesticide applications, and close a loophole that would allow persons to remain “in training” indefinitely.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
Frank A. Gasperini, Jr., Responsible Industry for a Sound Environment	Expressed concern that the term “persons with a history of repeat violations” (as grounds for denying certification) is not sufficiently clear to separate those persons against whom violations have been adjudicated from those who were alleged to have committed violations.	The term “history of repeat violations” refers only to compliance actions for which the appellate process has been exhausted.
Andrea Coron and Kevin Kordek,	Expressed concern that trainees will now have to be in constant visual contact with a supervising	The concept of requiring a certified commercial applicator trainer to be in visual contact with an uncertified trainee has been part of the

<p>Virginia Pest Management Association</p>	<p>commercial applicator for up to 90 days. Elimination of the ability of commercial applicators to proctor registered technician exams for their own employees will place a untenable financial burden on the regulants.</p>	<p>“working definition” of “direct on-site supervision” since the establishment of the Office of Pesticide Services in 1989. The proposed change clarifies what has always been intended, that the supervising applicator can observe and control all the trainee’s actions. The reason for recommending the repeal of proctored Registered Technician examinations is the lack of a practical means to retain the security of these exams under this program. This lack of security undermines the credibility of the program. The state provides a variety of other means to take the exams that should not cause undue hardship.</p>
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All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
2VAC 20-51-10	NA	Several terms are listed for definitions that are not used.	The amendment deletes the definitions for “adjuvant”, “nontarget organism”, “reentry interval”, “synergism”, and “unreasonable adverse effects on the environment.”
2VAC 20-51-10	NA	Definition of “Commercial Applicator not for hire”	The amendment simplifies the wording in the definition.
2VAC 20-51-10	NA	There is currently no definition of a “competent person” for the purposes of this regulation.	The amendment adds a definition of what constitutes a competent person. This term is used in 2VAC 20-51-10 under the definition of “Under the direct supervision of.”
2VAC 20-51-10	NA	There is currently no definition of a “Registered technician not for hire.”	The amendment adds a definition that describes this class of applicator, and parallels the definition of a “Commercial applicator not for hire.”
2VAC 20-51-10	NA	Definition of “Under the direct on-site supervision of” simply states that the supervising applicator must be physically present on the property upon which pesticides are being applied.	The amendment states that the supervising applicator, in addition to being on the property being treated with pesticides, must actually be in constant visual contact with the trainee as he is making the pesticide application.
2VAC-20-51-20	NA	Day-care facilities are not mentioned as a site where	The amendment includes “day-care facilities” as one of the areas where commercial

		pesticide applications need to be certified if they are not for hire applicators.	applicators not-for-hire must be certified in order to use any pesticide. § 3.1-249.53.D. of the Code of Virginia requires that commercial applicators not-for-hire who apply pesticides in day-care facilities be certified. This requirement was inadvertently left out of the current regulation.
2VAC-20-51-20	NA	Refers to “the use of any pesticides”	The amendment corrects the wording to “the use of any pesticide.”
2VAC 20-51-20	NA	Under the process for obtaining certification, it is implied that an application needs to be completed but is not stated here.	The amendment includes the specific requirement of completing and submitting an application for certification to the Commissioner.
2VAC 20-51-20	NA	States that following a failed exam the application must be accompanied by the certification fee again.	The amendment simply states that the fees to be paid must be only as stipulated by the fee regulation; a fee is not necessarily required on the second attempt since the fee regulation does not require that per se.
2VAC 20-51-20	NA	Makes reference to “business license”; states that “Persons” may appear before the board to explain why they should not be denied certification.	The amendment inserts the word “pesticide” before “business license” to clarify which type of license revocation will be considered and inserts “Such” before “persons” to clarify which persons may appear before the board. It also refers to the Virginia Pesticide Control Act that sets the considerations that the Board must weigh before deciding to deny, suspend, revoke, or modify any certificate or license.
2VAC 20-51-20	NA	States that people cannot apply pesticides until certification has been issued by the Commissioner.	The amendment clarifies that in order to apply pesticides, people must have taken and passed the category-specific exam for each category in which they wish to apply pesticides. They cannot apply pesticides in multiple categories by taking only one category-specific exam.
2VAC 20-51-30	NA	States that fees must be paid as determined by regulations promulgated by the Pesticide Control Board.	This amendment specifies that the fees are described in 2VAC 20-30.
2VAC 20-51-40	NA	Refers to a consultation with the Virginia Cooperative Extension Service agent.	This is an amendment to better describe the conditions under which an illiterate person might be granted a certificate and to apply the proper name for agents; it is now “Virginia Cooperative Extension agent.” The word “Service” has been dropped.
2VAC 20-51-50	NA	States that the applicant must take the Registered Technician exam within 90 days of submitting an application and fee.	This amendment makes it mandatory that the Registered Technician exam must be taken within 90 days of when a person has been hired or transferred into a position that requires the use of pesticides. The process to follow if an examination is failed is also described and requires that the applicant reapply and retake the exam within 30

			days. If the applicant fails the exam again, he cannot apply pesticides commercially until he is able to pass the exam. This is a change since the proposed stage.
2VAC 20-51-50	NA	Current language allows commercial applicators to proctor Registered Technician examinations.	This amendment repeals the language allowing Commercial Applicators to proctor the Registered Technician examinations. New language details the additional training required of a Registered Technician when he wants to work in a category that is different from the one in which he received his original training.
2VAC 20-51-70	NA	Current language states that this category applies to people using marine antifoulant paints containing TBT or other pesticides.	This amendment brings the regulation into compliance with 1995 changes to the Pesticide Control Act that require certification only when applicators in this category are applying TBT or other restricted use pesticides (not required for general use pesticides).
2VAC 20-51-70	NA	There is no "miscellaneous" pesticide applicator category.	This amendment establishes a "Miscellaneous" category to allow the Pesticide Control Board to certify applicators when using pesticides (or new use patterns) that have been recently classified as Restricted Use by the U.S. EPA but are not covered by current certification regulations. If this is not allowed, there might be many applicators and businesses that would no longer be able to legally apply such pesticides until the certification regulations were amended through the APA, which could take 1 ½ to 3 years.
2VAC 20-51-90	NA	Current language describes adverse environmental effects as one of the factors that potential applicators must have knowledge of to be qualified as a pesticide applicator.	The amendment stipulates that the required knowledge about environmental adverse effects refers specifically to those resulting from the application of pesticides.
2VAC 20-51-100	NA	Current language states which manual must be the basis for pesticide applicator training.	This amendment is a language housekeeping change only.
2VAC 20-51-160	NA	Current language says certain violations "shall" constitute grounds for certificate revocation.	This amendment brings the language for certificate revocation into compliance with the Virginia Pesticide Control Act which uses the term "may".
2VAC 20-51-160	NA	Current language states that a person's certificate shall be suspended if a civil penalty is not paid within 60 days according to a section of the Code of Virginia.	This amendment uses clearer and more easily understood language to explain that the suspension of a certificate is automatic for non-payment of a civil penalty within 60 days and the process for such a suspension.

2VAC 20-51-170	NA	Current language lists bodies of water as one of the data required to be reported when pesticide accidents or incidents occur.	This amendment narrows the scope of which bodies of water need to be reported in a case of pesticide accidents or incidences.
2VAC 20-51-200	NA	Current language states that commercial applicators not for hire keep records of certain pesticide applications.	The amendment requires Registered Technicians not for hire to keep records of pesticide applications as well as commercial applicators not for hire.
2 VAC 20-51-210	NA	Current language states that commercial pesticide applicators not for hire must keep records of restricted use pesticides used.	The amendment requires all applicators not for hire to keep records of all pesticides used, not just those classified as restricted use.

Regulatory flexibility analysis

Please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Under the Purpose section above, health, safety, environmental, and economic welfare issues were discussed. Primarily, the certification program ensures through education and testing, that pesticides, when applied, are done so by those individuals that have requisite knowledge to avoid adverse impacts to the health of individuals, the environment, and the economy of both property owners and governmental entities. This certification program is common to most U.S. states. In fact, this similarity permits Virginia to enter into reciprocal agreements with other states to allow Virginia pesticide applicators to apply pesticides in those states without further testing. Virginia’s certification requirements are “certified” as having met the other states’ legal mandates. This allows Virginia businesses to be more competitive and save money in the course of conducting business across state lines.

The only other alternative to this type of certification program (one that requires studying manuals and then testing on such manuals) is one that might follow the provision in 2 VAC 20-51-40 B. This section specifically sets forth procedures to allow a limited number people, who cannot read or understand labels and who intend to apply restricted use pesticide on property in the production of agricultural commodities, to do so without having to take and pass the required examination for Private Applicators. However, this process requires a meeting between the grower, the Virginia Cooperative Extension Agent for the locality where the property is located, and the investigator for VDACS to determine specific knowledge about the crop being treated, the pesticide being used, and all label, environmental, and safety issues associated with the pesticide’s use. This is a very time-consuming process that takes several hours for each person involved. To date there are less than 6 such persons certified under this section of the regulation. To implement a similar program for all of Virginia’s 15,000 plus applicators would be both impractical and economically prohibitive. It would also require changes in the statute, specifically § 3.1-249.27 and § 3.1-249.52 through § 3.1-249.54.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

It is not anticipated that these proposed changes will have any impact on the family or family stability.